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In the Supreme Court of the United States.

OCTOBER TERM, 1967.

No.

JOHNSON PRODUCTS, INC.,
Appellant,
v.
CITY COUNCIL OF MEDFORD ET AL.,
Appellees.

JURISDICTIONAL STATEMENT.

Appellant appeals from an order for judgment (A. 18) of the Superior Court of the Commonwealth of Massachusetts entered on November 29, 1966, and affirmed by the Supreme Judicial Court of Massachusetts on January 17, 1968, rehearing denied on January 30, 1968, which judgment dismissed a petition for common-law certiorari, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

Opinion Below.

The Superior Court did not file an opinion. The opinion of the Supreme Judicial Court on appeal is reported in the Massachusetts Advance Sheets (1968) at page 131, and at 233 N.E. 2d 316. (The Supreme Judicial Court did not file an opinion on the petition for rehearing.) A copy of the

opinion of the Supreme Judicial Court is annexed hereto as Appendix A.

Jurisdiction.

The jurisdiction of the Supreme Court to review the judgment on appeal is conferred by Title 28, United States Code, section 1257 (2). *Saunders* v. *Shaw*, 244 U.S. 317. *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282. *Lawrence* v. *State Tax Commission of Mississippi*, 286 U.S. 276.

Question Presented.

Is section 13 of chapter 148 of the General Laws of Massachusetts constitutional within the purview of the due-process clause of the Fourteenth Amendment when, as interpreted by the highest court of Massachusetts, it permits municipal licensing authorities to deny a license to operate a gasoline station on the basis of facts not presented at the hearing on the issuance of the license and without giving reason for their decision?

Statutes Involved.

Section 13 of chapter 148 (the relevant portion), section 4 of chapter 249, and section 1D of chapter 213 of the Massachusetts General Laws are set forth in Appendix B hereto.

Statement.

The only source of facts in this case is the appellant's petition for writ of certiorari, to which a demurrer was sustained, and the opinion of the Supreme Judicial Court.

Under Massachusetts practice all facts stated in the petition are, for purposes of the demurrer, deemed to be true. *Joyce* v. *Hickey,* 337 Mass. 118, 121-122. Briefly summarized, the allegations of the petition are these:

On January 28, 1966, the appellant, an "independent" corporation qualified in the operation of retail gasoline stations by background and experience, applied to the City Council of Medford (Massachusetts) for a permit to operate a gasoline station and to store gasoline underground in connection therewith. The locus of the proposed station was zoned for such use. The application[1] was approved by the City engineer, the City Manager and the Chief of the Fire Department.

A hearing on the application was held before the City Council on February 16, 1968, at which time the members were made aware of the aforementioned approvals. No sworn evidence was presented to the council at the hearing or any other time to justify the denial of the application. All rational, credible evidence tended to show the issuance of the application to be consistent with the public health, welfare, safety and convenience. The granting of the license would not increase the hazard of fire or explosion. Nevertheless, without giving any reasons for its action, the council did deny it.

On June 8, 1966, the appellant filed a petition for common-law certiorari in the Superior Court.[2] If the allega-

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[1] This form is also known as a petition and is part of the record in this case. However, to distinguish it from the petition for writ of certiorari, in which the judgment is now being appealed, the initial pleading filed by the appellant with the City Council will throughout this statement be designated an "application."

[2] With the petition for certiorari, the appellant also filed a bill for declaratory relief, to which the Superior Court overruled a demurrer by the defendants (A. 20). The bill was heard on the merits and decided by a final decree adverse to the appellant. The

tions of the petition showed that the agency whose action is sought to be reviewed committed an error of law, includ-

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appellant appealed from the decree in the declaratory-relief proceeding to the Full Bench of the Supreme Judicial Court, which reversed the final decree and ordered the bill dismissed on the ground that declaratory relief was inappropriate in this case. Federal questions of procedure and substance were raised in the bill and by the appeal from the original final decree.

Appellant recognizes that under the decision in *National Association for Advancement of Colored People* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 456-457, an appeal would probably lie from the final decree on the bill for declaratory relief as well. As the Supreme Judicial Court itself pointed out, no attempt was made by the appellee to appeal or argue against the appropriateness of declaratory relief after an initial stage of the proceedings when the Superior Court overruled the appellee's demurrer to the bill (A. 20). Despite the language in *Carlton Hotel, Inc.*, v. *Abrams*, 322 Mass. 201, and *James Construction Co., Inc.*, v. *Commissioner of Public Health*, 336 Mass. 143, cited by the Supreme Judicial Court for the proposition that "appeal from the final decree opens the question whether a declaratory decree ought to be entered" (A. 22), the *Carlton* and *James* cases are grossly inapposite; both arose after the sustaining of demurrers on precisely the ground that declaratory relief was unavailable, and in both cases the parties argued this point in their briefs. (In *Carlton*, see pages 4-7 of the petitioner's brief and the same pages of the defendant's brief; in *James*, see pages 3-7 of the plaintiff's brief and pages 8-14 of the briefs for the defendants.) Both cases, therefore, rest on nothing more than the usual rule of Massachusetts equity procedure that appeal from a final decree dismissing a bill after the *sustaining* of a demurrer thereto brings before the Supreme Judicial Court the correctness of the ruling on demurrer. *Carson* v. *Gikas*, 321 Mass. 468, 469.

Not only did the present appellant have no reason to suppose that the Supreme Judicial Court would rule on the appropriateness of declaratory relief, but the decision on this point is also inconsistent with several other Massachusetts cases seemingly permitting declaratory relief as a substitute for certiorari. Compare, *e.g.*, *Grande & Son, Inc.*, v. *School Housing Committee of North Reading*, 334 Mass. 252, with *Fred C. McClean Heating Supplies, Inc.*, v. *Westfield Trade High School Building Committee of Westfield*, 345 Mass. 267; *N. V. Handel Industrie Transport Maatschappij* v. *State Fire Marshal*, 305 Mass. 482 with *Frontier Research Inc.* v. *Com-*

ing, of course, federal constitutional law, the petitioner was entitled to a return. *Weed* v. *Mayor & Aldermen of Boston*, 172 Mass. 28, 29. The City Council demurred to the petition primarily on the ground that it failed to allege clearly any error of law in the denial of the license. The demurrer was sustained. An order of dismissal was then entered, and this order was appealed to the Full Bench of the Supreme Judicial Court. Appeals to the Supreme Judicial Court in certiorari proceedings are governed by the same rules as govern appeals in equity. G.L. c. 213, § 1D.[3] An

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missioner of Public Safety, 351 Mass. 616; *Lowell* v. *County Commissioners of Middlesex*, 152 Mass. 372, with *Coan* v. *Board of Assessors of Beverly*, 349 Mass. 575. In at least three licensing cases declaratory relief has been used to obtain judicial review of an administrative decision. *Turnpike Amusement Park, Inc.*, v. *Licensing Commission of Cambridge*, 343 Mass. 435. *Ferris* v. *Board of Selectmen of Norwell*, 344 Mass. 757. *South Shore National Bank* v. *Board of Bank Incorporation*, 351 Mass. 363. In *Ferris, supra*, and *South Shore, supra*, the court expressly held declaratory relief available for such review. These three cases involve licensure respectively of pin-ball arcades, liquor stores and banks, businesses affected with a public interest to at least the same extent as, and whose licensing involves no lesser exercise of discretion than, the licensing of gasoline stations. The case of *Butler* v. *East Bridgewater*, 330 Mass. 33, upon which the Supreme Judicial Court seems to place paramount reliance for its holding in the case at bar (A. 21, 22), actually reached a diametrically opposite result and granted declaratory relief to resolve the issues of law raised by the parties.

It is therefore difficult to escape the conclusion that the Supreme Judicial Court in holding declaratory relief unavailable was enunciating a new doctrine and using that doctrine as a basis for not deciding duly raised federal constitutional questions. See, in addition to *National Association for Advancement of Colored People* v. *Alabama ex rel. Patterson, supra, Missouri ex rel. Missouri Insurance Co.* v. *Gehner*, 281 U.S. 313, 320. Appellant, however, does not appeal to this Court from the dismissal of its bill, because it also brought certiorari, which the Supreme Judicial Court said was the appropriate remedy.

[3] References to "G.L." followed by chapter and section are, throughout this statement, to the General Laws of Massachusetts.

appeal from a final judgment under that statute brings before the court all questions of fact, law and discretion. *Lawrence* v. *Commissioners of Public Works,* 319 Mass. 700, 702. The certiorari and declaratory-relief cases were consolidated for briefs and argument. Briefs were filed, and on October 5, 1967, the court heard oral argument. On January 17, 1967, it entered a rescript accompanied by an opinion, and affirmed the judgment below.

So much of the opinion as held declaratory relief unavailable has already been summarized and criticized in footnote 2 of this statement. The court left no doubt that certiorari was the appropriate form of action to review the denial of a license by local authorities acting under G.L. c. 148, § 13 (A. 22). It is held, however, that the writ was unavailable to the present appellant. The holding seems to rest on three somewhat indistinguishable grounds: (1) That the petition "recites extraneous matters to which a response is impossible"; (2) that the petition "states generalities of fact and conclusions of law to support allegations of arbitrariness and unlawful conduct"; and (3) that the petition "makes no claim as to the matter of law apparent on the record."[4]

As to the allegedly "extraneous" matter to which response was supposedly impossible, the court pointed out that, as appellant argued in its brief (Bf. 5): "The peculiar office of the petition [for certiorari] is to get a return from the respondent rather than an answer" (A. 18). It is therefore unimportant whether the respondent can "answer" the allegations of such a petition.[5]

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[4] The court does not deal with and presumably does not accept the other ground of the appellee's demurrer, that the petition is multifarious. Clearly it was not. See *Fallon* v. *Street Commissioners of Boston,* 309 Mass. 244, 245, 247, requiring all errors of law to be alleged in a single petition.

[5] The allegations of the petition which the appellee claims are extraneous ("The Petitioner operates gasoline stations at several

The court pointed to certain language in the petition that it said is conclusionary (A. 19). Doubtless some of it is. It is unnecessary, however, to consider the extent to which this language properly alleges error of law (see *Brown* v. *Western Railway of Alabama*, 338 U.S. 294, 296), since the appellant does not base its appeal to this Court on any of that language.

The court then comes to the real question: whether error of law was alleged in the petition. It holds, *semble*, that, if error had been alleged, the demurrer should not have been sustained. Purporting to be perplexed by the allegation of the petition that "no sworn evidence was presented to the council" to justify denial of the license, the court points out that testimony under oath or affidavit is not needed to support denial of licensure. Further construing the words "sworn evidence" (see *Staub* v. *Baxley*, 355 U.S. 313, 318-320), it goes on to add (A. 20) that a "view, exhibits and *matters of common knowledge in the community* . . . are not 'sworn evidence' and yet could properly be considered by the council in arriving at its decision." (Emphasis supplied.) The court continues (A. 20): "The 'somewhat wide discretion' given to the licensing authority 'extends beyond the mere question of fire risk and involves other considerations affecting the public interests.' . . .

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locations in the Commonwealth. The Petitioner has never been cited by any public officer or summoned into any court in civil or criminal session for violating any statute of the Commonwealth or any regulation or ordinance of any agency or subdivision thereof, in connection with the operation of any of its gasoline stations") are inserted to show that the appellant is "within the class of those entitled" to a license under the rule of *Goldsmith* v. *United States Board of Tax Appeals*, 270 U.S. 117, 123. Even if the Supreme Judicial Court did deem this allegation "extraneous," the question of its sufficiency to assert a federal ground would be open to this court on appeal. *West Chicago Street Railroad Co.* v. *Illinois ex rel. Chicago*, 201 U.S. 506, 519-520. *Brown* v. *Western Railway of Alabama*, 338 U.S. 294, 296, and cases cited.

The implication in the petition that somehow the burden is on the council to justify the denial of the license is untenable. *So, too, is the innuendo that the council was under a duty to state reasons for the denial."*[6] (Emphasis supplied.)

Appellant was thoroughly unprepared for the court's holding in this case. To begin with, as footnote 2 of this Statement shows, appellant had not the slightest reason to suspect that declaratory relief was inappropriate. Although appealing from the order dismissing the petition for certiorari and believing that it was entitled to the return[7] on its petition, appellant, in view of the *Ferris* case and other Massachusetts cases cited in footnote 2, and especially after the overruling of appellee's demurrer, relied primarily upon its bill for declaratory relief for the reversal of the council's action. Appellant believed, and had good reason to believe, that the Superior Court's decree would be reversed on the bill and that a decree favorable to the appellant would be entered. As the appellant argued to the Supreme Judicial Court in the declaratory relief proceeding, it was entitled to a decree in its favor *pro confesso* and, even if it were not, it was entitled to a favorable final decree, because the judge's findings were unsupported by evidence and all evidence in the Superior Court (on the bill) showed the correctness of the appellant's position.

Secondly, the appellant could not reasonably anticipate that the appellee's demurrer to the petition for certiorari

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[6] Nowhere in the petition does appellant imply that the "burden is on the Council to justify the denial of the license." Appellant agrees that the general rule is probably otherwise. See, however, *Schware* v. *Board of Bar Examiners of New Mexico*, 353 U.S. 232, 246-247.

[7] In the trial of the bill for declaratory relief the justice of the Superior Court had excluded questions to the members of the City Council aimed at eliciting their reasons for the denial of licensure.

would be upheld on the common-knowledge-in-the-community grounds. Both the statutory and the case law in Massachusetts flatly state that it is open to a petitioner for certiorari to contend that the respondent's decision was based on insufficient evidence. G.L. c. 249, § 4. *Tracht* v. *County Commissioners of Worcester,* 318 Mass. 681, 683. See *DiMaggio* v. *Mystic Building Wrecking Co., Inc.,* 340 Mass. 686, 691. Furthermore the rule in Massachusetts had previously been that adjudicatory decisions of municipal administrative agencies must be made "in a fair, judicial and reasonable manner *upon the evidence as presented* . . ." (Emphasis supplied.) *Butler* v. *East Bridgewater, supra,* 38. *Board of Health of Woburn* v. *Sousa,* 338 Mass. 547, 553. This rule had only recently been so strongly reinforced in the case of *Milligan* v. *Board of Registration in Pharmacy,* 348 Mass. 491, 496, that there was no occasion to foresee that the Supreme Judicial Court would interpret G.L. c. 148, § 13, to permit local licensing authorities to decide applications thereunder on "matters of common knowledge in the community." It may be added that the appellee never contended in either brief or oral argument in any court that "matters of common knowledge" were a permissible standard upon which the council could base its decision. Finally, and most importantly, as long as the appellant had reason to believe that declaratory relief was available, the basing of the council's decision on issues of which an applicant was unaware would not have been constitutional error, since the applicant would have other opportunity for a full and fair hearing. *Bourjois Inc.* v. *Chapman,* 301 U.S. 183, 185-186.

As to the other ground of this appeal—that the Supreme Judicial Court erred in holding that the council need not state reasons when it denies licensure under G.L. c. 148, § 13—the constitutional point was fully argued in the ap-

pellant's brief to the Supreme Judicial Court (Bf. 19-20). However, a consolidated brief was filed in that court covering both the certiorari and the declaratory proceedings. The argument as to the need for reasons was made in that part of the brief dealing with the latter rather than the former, since the justice of the Superior Court in his order for declaratory decree had explicitly held that the "Council need not state its reasons for denying the permit."

Because the Supreme Judicial Court's decision holding declaratory relief an improper remedy (and thereby vitiating all the substantive points argued by the appellant in regard thereto) in this case and holding "matters of common knowledge in the community" adequate to justify denial of a license was unforeseen and unforeseeable, the appellant, on January 22, 1968, five days after rescript, petitioned that court for rehearing.[8] The procedure for requesting rehearing by the Supreme Judicial Court is informal. See *Wall* v. *Old Colony Trust Co.*, 177 Mass. 275, 278; *Powers* v. *Sturtevant*, 200 Mass. 519, 521. It generally consists of a letter to the Chief Justice setting forth the reasons why rehearing should be granted. Nevertheless, the proceeding has juridical standing. In at least one case known to the appellant, *Glazier* v. *Andrews*, 349 Mass. 417, a request for rehearing resulted in the withdrawal of the opinion and a diametrical change in the rescript.

As already noted, the appellant had raised the federal constitutional question "as early as the drafting of the complaint" (Stern & Gressman, Supreme Court Practice, 3d ed., §§ 3-4), and had reiterated in its brief on declaratory

[8] Though the appellant in its notice of appeal designated both the request for rehearing and the denial thereof as part of the record in its notice of appeal to this Court, these papers, so it is informed by the clerk, are not in his file and so will not be sent. Accordingly, they are being printed, together with acknowledgment of receipt of the request, in Appendix C to this Statement.

relief that G.L. c. 148, § 13, would be unconstitutional if local authorities could deny licenses without giving reasons. In requesting rehearing, however, it sought to apply the lack-of-reasons argument to the certiorari proceeding (C. 29) and to point out that, if the matters-of-common-knowledge standard was permitted to stand, the statute would be unconstitutional (C. 28). This argument was timely in view of the doctrine that, when a federal question not required to be anticipated is decided adversely to a litigant in appellate proceedings, it may properly be raised by a petition for rehearing. *Saunders* v. *Shaw,* 244 U.S. 317, 320. On January 25, 1968, appellant was notified that its request for rehearing would be considered by the Full Court (C. 31), and on January 31, 1968, the appellant received notice that its petition had been considered by the Full Court and denied (C. 31). On January 31, 1968, the appellant filed with the Supreme Judicial Court a notice of appeal to the Supreme Court of the United States. Pursuant to that notice, this Statement is filed.

The Questions are Substantial.

It has already been established in the immediately preceding part of this Statement that the Supreme Judicial Court necessarily decided in this case two questions of constitutional procedure, and decided them both adversely to the appellant. In sum, the court held that local licensing authorities acting under G.L. c. 148, § 13, need not decide a license application on the basis of facts developed or noticed at a hearing on that application (whether by the applicant, the opposition, municipal employees or the council itself), but may base their decision on "matters of common knowledge in the community," and that these authorities are under no duty to state any reasons for their decision.

It is difficult to imagine a course of proceeding better designed to abet arbitrary and capricious conduct from municipal licensing authorities. Such conduct is constitutionally proscribed when its effect is to bar ostensibly qualified persons[9] from engaging in a lawful occupation. *Truax* v. *Raich*, 239 U.S. 33, 41. *Louis K. Liggett Co.* v. *Baldridge*, 278 U.S. 105, 113. *Daniel* v. *Family Security Life Insurance Co.*, 336 U.S. 220, 225. *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U.S. 483. *Schware* v. *Board of Bar Examiners of New Mexico*, *supra*, at pp. 246-247. True, as the court noted in the *Daniel* case, "a pronounced shift of emphasis . . . has deprived the words 'unreasonable' and 'arbitrary' of the content" which they held when *Louis K. Liggett Co.* v. *Baldridge*, *supra*, was decided. See *Ferguson* v. *Skrupa*, 372 U.S. 726, 731-732. But it is likewise true that, even as the scope of "substantive due process" has been restricted, the scope of procedural due process, as applied to the right to engage in a business or profession, has been maintained and even expanded. See *Goldsmith* v. *United States Board of Tax Appeals*, 270 U.S. 117, 123. *Cf. Greene* v. *McElroy*, 360 U.S. 474, 492, 496-497; *Willner* v. *Committee on Character and Fitness*, 373 U.S. 96, 102, 103-105; *Elfbrandt* v. *Russell*, 384 U.S. 11, 15-17; *Spevack* v. *Klein*, 385 U.S. 511, 516.

It should not require more than a whisper to establish the proposition that the due-process clause of the Fourteenth Amendment permits no one to be deprived of the liberty to engage in gainful employment except upon a hearing. *Goldsmith* v. *United States Board of Tax Appeals*, *supra*. *Willner* v. *Committee on Character and Fitness*, *supra*. Nor is any blaze of rhetoric necessary to illustrate

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[9] A corporation, needless to say, is a "person" within the purview of the due process clause of the Fourteenth Amendment. *Norfolk & Western Ry. Co.* v. *Missouri State Tax Commission*, 88 S. Ct. 995, 1003.

that there is, as a recent legal encyclopedia puts it, "no hearing in the constitutional sense where the party does not know what evidence is offered or considered and is not given an opportunity to test, explain or refute." 16 Am. Jur. 2d, § 279, p. 985. *Interstate Commerce Commission* v. *Louisville & Nashville Railroad Co.*, 227 U.S. 88, 93. *Morgan* v. *United States*, 304 U.S. 1, 18. Especially in a situation such as the present, where the only hearing which the applicant can obtain (*cf. Opp Cotton Mills, Inc.*, v. *Administrator of Wage & Hour Division of the Department of Labor*, 312 U.S. 126, 155, and cases cited; *Lichter* v. *United States*, 334 U.S. 742, 791-792) is before the City Council (A. 22) and the only review of the council's action is by the extremely limited common-law writ of certiorari[10] (*cf. Bourjois, Inc.*, v. *Chapman*, 301 U.S. 183, 185-186), a sham hearing is as bad as none at all. See *Wong Yang Sang* v. *McGrath*, 339 U.S. 33, 49-51.

Yet, if licensing authorities base their rejection of an application on matters of "common knowledge" in the community, any "hearing" that they purport to hold is a sham, since the applicant will have no idea of what evidence he need explain, test or refute. To say this is perhaps to say that the standard suggested by the Supreme Judicial Court is entirely too vague and that what is "common knowledge in the community" to one person may be thoroughly disputed by another and unknown to still another. The Supreme Judicial Court apparently considers "hours of heavy traffic" to be a "matter of common knowledge" (A. 20). Yet what basis is there for assuming that the general governing body of any city (such as Medford) is aware of

[10] In which only errors of law apparent upon the face of the return may be corrected (*Prusik* v. *Board of Appeal of Building Department of Boston*, 262 Mass. 451, 452, 453) and in which the facts stated in the return must be accepted as true. *Real Properties, Inc.*, v. *Board of Appeal of Boston*, 311 Mass. 430, 431.

heavy hours of traffic throughout the community? And, even if one indulges the court in the assumption that city councillors, at least in Massachusetts, as a result of being elected to their positions automatically acquire some kind of city-wide expertness as to hours of heavy traffic, should not an applicant be able to show that operation of *his* business will not hinder, endanger or delay that traffic? How much traffic is so "heavy" within the purview of the statute that an application to operate a gasoline station ought to be denied because of it? Surely an applicant would want to present evidence on that point *if* he is aware that the council is concerned about it. For, while we are on the subject of "heavy traffic," is it not reasonably well known that gasoline stations are almost universally located in areas where the traffic *is* somewhat heavy? And, if this is so, is there not particularly good reason why an applicant should have the opportunity to examine opinions or beliefs about such traffic before it is used as the basis for denying a license?

If these rhetorical questions show, as appellant submits they do, the purpose of, and need for, a hearing "in the constitutional sense" on traffic questions, how much greater is that need and more obvious that purpose when it comes to facts that are even less susceptible of cut-and-dried evaluation! What about such questions as the effect of the proposed gas station on competition (see *Kidder* v. *City Council of Brockton*, 329 Mass. 288, 290-291) or the applicant's reputation in the community? The court did note after all (A. 20), quoting from *Scudder* v. *Selectmen of Sandwich*, 309 Mass. 373, 376, that there is "somewhat wide discretion" in the licensing authorities that extends generally to "considerations affecting the public interests." Appellant submits that the very breadth of the "discretion" conferred upon the council demands that its decisions be based upon

facts developed at the hearing and not upon so vague a standard as matters of common knowledge in the community. See Davis, "The Requirement of a Trial-Type Hearing," 70 Harv. L. Rev. 193, 229-230. *Cf. Cafeteria & Restaurant Workers Union, Local 473, AFL-CIO,* v. *McElroy,* 367 U.S. 886, rehearing denied 368 U.S. 869.

Yet, if the court's holding that an application under G.L. c. 148, § 13, may be denied on the basis of "common knowledge in the community" is constitutionally erroneous, its holding that the council is under no duty to state reasons for such denial is even worse. It should be a sufficient rebuttal to the Supreme Judicial Court that its opinion flies in the face of the rule that an applicant denied the right to engage in a legitimate business is "clearly entitled to notice of . . . the grounds for his rejection." *Willner* v. *Committee on Character and Fitness, supra,* at p. 105. *Wichita Railroad & Light Co.* v. *Public Utilities Commission of Kansas,* 260 U.S. 48, 58-59. *Goldsmith* v. *United States Board of Tax Appeals, supra,* 123. *Florida* v. *United States,* 282 U.S. 194, 215. See *Lawrence* v. *Civil Aeronautics Board,* 343 F. 2d 583, 588 (C.A. 1), and cases cited.

Wigmore says:

> "It ought to be elementary, as it is fundamental, that they [administrative officials] should make no use of relevant matters in their personal (supposed) knowledge, or in their official documents, without stating them and putting them into the record during the hearing. Otherwise, the party affected has no fair chance to test and perhaps dispute that supposed knowledge; nor is the appellate tribunal furnished with a dependable record." 6 Wigmore, Evidence (3d ed.), § 1805.

Neither the language nor the substance of Professor Wigmore's thesis requires elaboration. It is all too clear that,

if municipal agencies can deny the right to engage in a legitimate business without stating any reasons either in fact or in law for their decision, a person seeking to exercise that right is without protection from arbitrary and capricious conduct. It is therefore the absence of a duty to state reasons, and not the duty itself, that, to use the language of the Supreme Judicial Court, is "untenable."[11]

Appellant submits that the Supreme Judicial Court erred in holding that the right to engage in the business of operating a gasoline station may be denied by municipal licensing authorities on the basis of "common knowledge in the community" and without giving reasons for their decision. In view of the importance of this business in this automotive age, the appeal presents a question not only of substantial justice but also of public importance.

Respectfully submitted,
DAVID BERMAN,
JOHN F. ZAMPARELLI,
ZAMPARELLI AND WHITE,
Counsel for the Appellant.

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[11] The Massachusetts cases cited by the Supreme Judicial Court for its proposition, assuming that they were decided on federal constitutional grounds, are not in point. *Cefalo* v. *Board of Appeal of Boston*, 332 Mass. 178, involved denial of a zoning variance. A municipal zoning ordinance is legislative enactment (see *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 390), and an administratively granted exception to such an ordinance is also of a discretionary, rather than a judicial, nature. See *Health* v. *Mayor & Council of Baltimore*, 187 Md. 296. In such cases no statement of reasons is required. *Pacific State Box & Basket Co.* v. *White*, 296 U.S. 176, 186. *Adams* v. *Adams*, 331 Mass. 354, involved the right to facts upon denial of a divorce, the right to which does not fall within the ambit of the due-process clause. See *Maynard* v. *Hill*, 125 U.S. 190, 205-210.

Appendix A.

Opinion of the Supreme Judicial Court.

1968 Mass. Adv. Sh. 131.

JOHNSON PRODUCTS, INC. *vs.* CITY COUNCIL OF MEDFORD (and a companion case[1]).

Middlesex. October 5, 1967.—January 17, 1968.

Present: WILKINS, C.J., SPALDING, CUTTER, KIRK, & SPIEGEL, JJ.

Certiorari. Pleading, Civil, Petition, Demurrer. *License. Gasoline. Equity Jurisdiction,* Declaratory relief. *Equity Pleading and Practice,* Declaratory proceeding, Demurrer, Appeal.

Certiorari proceeding heard in the Superior Court on demurrer by *Chmielinski,* J.; suit in equity heard in the Superior Court on demurrer by *Chmielinski,* J., and on the merits by *Kalus,* J.

KIRK, J. The two cases which have been argued together arise from a single dispute. Johnson Products, Inc. (Johnson), an operator of retail gasoline outlets at several locations in Massachusetts and elsewhere in New England, applied on January 28, 1966, to the city council of Medford (the council) for a license to build and operate a "gasoline island," as it calls its outlets, at the Fellsway Shopping Center in Medford. G. L. c. 148, § 13. Following a hearing by the council on February 16, 1966, the application was denied by unanimous vote.

On June 8, 1966, Johnson filed a petition for a writ of certiorari against the council. On the same day it filed a bill for declaratory relief against the city and the council

[1] The companion case is by the same plaintiff against the city of Medford and the city council.

under G. L. c. 231A, § 1. In each case the result was adverse to Johnson.

1. We consider first the petition for a writ of certiorari. The council filed a demurrer to the petition. After hearing, the demurrer was sustained, and an order for judgment was entered that the petition be dismissed. Johnson appealed.

At the outset we make a few general observations. The special function of a petition for a writ of certiorari has been frequently stated. *Tracht* v. *County Commrs. of Worcester,* 318 Mass. 681, 686.[2] Although the peculiar office of the petition is to get a return from the respondent rather than an answer, *Byfield* v. *Newton,* 247 Mass. 46, 52, the petition may be challenged by demurrer and when so challenged the petition must show on its face that the petitioner is entitled to the return. *Colantuoni* v. *Selectmen of Belmont,* 326 Mass. 778, 779. No intendment is made in favor of the pleader. *Sher* v. *Perlman,* 324 Mass. 390, 391–392. *Joyce* v. *Hickey,* 337 Mass. 118, 121–123. A decision sustaining generally a demurrer to a petition for a writ of certiorari will be upheld "if any ground assigned is sufficient to show that the petition . . . is defective." *Lucia* v. *Water & Sewer Commrs. of Medford,* 332 Mass. 468, 470.

The council's demurrer assigned four grounds (see G. L. c. 231, § 16) which stated, in summary, that the petition: (1) recites extraneous matters to which a response is impossible; (2) states generalities of fact and conclusions of law to support allegations of arbitrariness and unlawful conduct; (3) is multifarious in attempting to raise issues

[2] Where Ronan, J., said: "The function of a writ of certiorari is not to reverse or revise findings of fact but to correct errors of law committed by a judicial or quasi judicial tribunal where such errors appear upon the face of the return and are so substantial and material that, if allowed to stand, they will result in manifest injustice to a petitioner who is without any other available remedy."

of constitutionality and improper exercise of discretion; and (4) makes "[n]o claim . . . as to the matter of law apparent on the record." Only these assigned grounds may be considered in ruling on the demurrer. *Washington* v. *Eames,* 6 Allen 417, 419–420. *Train* v. *Boston Disinfecting Co.* 144 Mass. 523, 525. *Sullivan* v. *Superior Court,* 271 Mass. 435, 436.

The sustaining of the demurrer was not error. The petition fails to allege clearly error of law. Stated otherwise, whatever error of law was intended to be stated is so ineptly phrased or so obscured by other allegations as not to be discernible. See *Sears* v. *Treasurer & Recr. Gen.* 327 Mass. 310, 314. One paragraph states that Johnson has never been cited criminally or civilly in its business; another argues inter alia that the granting of the license would not increase the hazard of fire or explosion near the locus, and that "there is no reason in law or in fact for having denied it." Still another paragraph alleges that "all rational and credible evidence tended to show that the granting of the . . . [license] is consistent with the public health, safety and welfare." The foregoing allegations, it seems to us, relate not to error of law, but fall within grounds 1 and 2 of the demurrer.

The petition further alleges that "No *sworn evidence* was presented to the Council . . . which would have justified denial" (emphasis supplied). We are unable to discern the intended meaning of the words "sworn evidence" in the context of the petition or of the case. If the intended meaning is that testimony under oath is necessary to justify denial of a license, the answer is that we are aware of no such requirement and the petitioner points to none. If the intended meaning is that affidavits must be submitted the answer is the same. Whatever the intended meaning of the term may be, a local licensing authority under G. L. c. 148, § 13, is not so closely circumscribed as the petition seems to

allege in determining whether a license should issue or be withheld. A view, exhibits, and matters of common knowledge in the community, such as hours of heavy traffic, are not "sworn evidence" and yet could properly be considered by the council in arriving at a decision. The "somewhat wide discretion" given to the licensing authority "extends beyond the mere question of fire risk and involves other considerations affecting the public interests." *Scudder* v. *Selectmen of Sandwich*, 369 Mass. 373, 376. *Kidder* v. *City Council of Brockton*, 329 Mass. 288, 290. The Administrative Procedure Act, G. L. c. 30A, is not applicable. Compare *Milligan* v. *Board of Registration in Pharmacy*, 348 Mass. 491. The implication in the petition that somehow the burden is on the council to justify the denial of the license is untenable. So, too, is the innuendo that the council was under a duty to state reasons for the denial. See *Cefalo* v. *Board of Appeal of Boston*, 332 Mass. 178, 181; *Adams* v. *Adams*, 331 Mass. 354, 358.

In summary the petition is a complaint that Johnson lost when it should have won the decision, but it cites no error of law made by the council in arriving at the decision. The demurrer was properly sustained.

2. We turn to the bill for declaratory relief. In substance, the averments of the bill were the same as those in the petition for a writ of certiorari. The court was asked to declare that the license ought to have been granted and to enter a decree to enforce Johnson's "rights." A demurrer to the bill was filed, and, after hearing, overruled by the same judge who sustained the demurrer in the companion case. No appeal was taken from the decree overruling the demurrer. The case was tried before another judge, who entered a decree that no modification of the council's decision was required. It is obvious from a reading of the record that the trial judge, despite the order overruling the demurrer, had serious misgivings as to the efficacy and

propriety of the bill for declaratory relief. We think his misgivings were well founded.

Consideration of the question requires reference to the discussion by Qua, C.J. in *Butler* v. *East Bridgewater,* 330 Mass. 33, brought under G. L. c. 231A, § 1. The principal issues in the *Butler* case were the constitutionality of an enabling act for regulating the stripping of topsoil and the validity and interpretation of the by-law adopted by the town under the statute. The controversy was clearly within the purview of G. L. c. 231A, § 1. 330 Mass. 33, 34–38. Another issue in the case was the validity of the selectmen's decision denying a permit to the plaintiffs for the removal of topsoil. The court decided the main issues. It then discussed at some length the advantages of resolving the permit issue on a return in a petition for a writ of certiorari, and pointed out the impracticability of attempting to settle the issue under G. L. c. 231A, § 1. 330 Mass. 33, 38–40. The court then said, "So much expense has been incurred in trying this case, preparing the record and arguing the appeal that *we feel under an obligation to carry this discussion as far as may be done* with a reasonable prospect of bringing the controversy to an end, *while still keeping within the very broad limits of declaratory relief as defined in G. L. (Ter. Ed.) c. 231A*" (emphasis supplied). With great circumspection the court avoided making any declaration of right on the selectmen's decision denying a permit. It stated that "we cannot on this record declare invalid the action of the selectmen in refusing permits. . . ." The court did declare the courses of action which the selectmen should follow, contingent upon the findings which they might make if they chose to reconsider the applications for the permits. The *Butler* case therefore does not stand for the proposition that G. L. c. 231A, § 1, provides an alternate or substitute remedy for a petition for a writ of certiorari. We hold that it is not an alternate or proper rem-

edy in the case before us. A binding declaration of "right" cannot be made under G. L. c. 231A, § 1, where, under a statute, within "a somewhat wide . . . area of discretion the power lies in the . . . [council] and not in the court," and the ordering of a license to issue "would amount to a usurpation by the court of the licensing power," *Scudder* v. *Selectmen of Sandwich*, 309 Mass. 373, 376–377, nor where "the decision in the first instance rests with the . . . [council]," and the "court could not substitute itself for the . . . [council]" nor where "the evidence before the . . . [council] may have presented a picture very different from that presented . . . [to the court]," *Butler* v. *East Bridgewater*, 330 Mass. 33, 39, nor where the several considerations affecting the public welfare are to be weighed by the council and "are not for the court to pass upon." *Kidder* v. *City Council of Brockton*, 329 Mass. 288, 290–291. The proper remedy for one who considers himself aggrieved by a decision in a dispute like the one before us is either to appeal under a statute which specifically provides a right of appeal from the decision or, if no right of appeal is so provided, to petition for a writ of certiorari. See *MacDonald* v. *Board of Health of Braintree*, 347 Mass. 76, 77–78.

We conclude that the bill on its face failed to state a case within the declaratory judgment statute, and therefore falls within the class of cases where the demurrer should have been sustained. *County of Dukes County* v. *New Bedford, Woods Hole, Martha's Vineyard & Nantucket S.S. Authy.* 333 Mass. 405, 406. *Brown* v. *Neelon*, 335 Mass. 357, 360–361. Although there was no appeal from the interlocutory decree overruling the demurrer, the appeal from the final decree opens the question whether a declaratory decree ought to be entered. *Carlton* v. *Abrams*, 322 Mass. 201, 203. *James Constr. Co. Inc.* v. *Commissioner of Pub. Health*, 336 Mass. 143, 146. G. L. c. 231A, § 3. For the reasons al-

ready stated, the declaratory decree must be reversed and a decree entered dismissing the bill. *Brookline* v. *Co-Ray Realty Co. Inc.* 326 Mass. 206, 213–214. The order for judgment dismissing the petition for a writ of certiorari is affirmed.

So ordered.

David Berman for Johnson Products, Inc.

Mark E. Gallagher, Jr., City Solicitor, for the City Council of Medford & another.

Appendix B.

Statutes.

MASSACHUSETTS GENERAL LAWS, CHAPTER 148.

SECTION 13. No building or other structure shall, except as provided in section fourteen, be used for the keeping, storage, manufacture or sale of any of the articles named in section nine, unless the local licensing authority shall have granted a license to use the land on which such building or other structure is or is to be situated for the aforementioned uses, after a public hearing, notice of the time and place of which hearing shall have been given, at the expense of the applicant, by the clerk of the city or of the local licensing authority, by publication, not less than seven days prior thereto, in a newspaper published in the English language in the city or town wherein said land is situated, if there is any so published therein, otherwise in the county in which such city or town lies, and also by the applicant by registered mail, not less than seven days prior to such hearing, to all owners of real estate abutting on said land or directly opposite said land on any public or private street as they appear on the most recent local tax list at the time

the application for such license is filed, and unless the application for such license shall have endorsed thereon the certificate of approval or disapproval of the head of the fire department. Such license shall be recorded in the office of the city or town clerk, and it shall, from the time of the granting thereof by the licensing authority, be deemed a grant attaching to the land described therein and as an incident of ownership thereof running with the land and shall not be deemed to be merely a personal privilege. Any license granted hereunder, or any license for the keeping, storage, manufacture or sale of any of the articles named in section nine, granted prior to July first, nineteen hundred and thirty-six, including any license reinstated and continued by the marshal as herein provided, shall remain in force unless and until revoked as hereinafter provided. Any such license granted hereunder shall be subject to such conditions and restrictions as may be prescribed in the license by the local licensing authority, which may include a condition that the license be exercised to such extent and within such period as may be fixed by such authority. [As amended through St. 1953, c. 200.]

. . . . . .

MASSACHUSETTS GENERAL LAWS, CHAPTER 249.

SECTION 4. A petition for a writ of certiorari to correct errors in proceedings which are not according to the course of the common law may be presented to a justice of the supreme judicial court, and he may, after notice, hear and determine the same. It shall be open to the petitioner to contend at the hearing upon the petition that the evidence which formed the basis of the action complained of or the basis of any specified finding or conclusion was as matter of law insufficient to warrant such action, finding or conclusion. The writ shall not be issued unless the petition therefor is presented within two years next after the pro-

ceedings complained of. It may be issued from the clerk's office in any county and shall be returnable as the court orders. The court at any time after the petition is presented may impose costs upon any party, may issue an injunction and may order the proceedings brought up; and, after they are brought up, may quash or affirm them, or may make such order, judgment or decree as law and justice may require. The powers conferred by the foregoing sentence shall apply also to a petition for a writ of mandamus and to an amended petition for either a writ of certiorari or a writ of mandamus under section one C of chapter two hundred and thirteen, subject in case of appellate proceedings, to the authority of the supreme judicial court to suspend the operation of any judgment or decree and to amend any order pending such appellate proceedings as is provided in equity by section twenty-two of chapter two hundred and fourteen. Where a petition is brought against a body or officer exercising judicial or quasi-judicial functions to prevent the body or officer from proceeding in favor of another party, or is brought with relation to proceedings already taken, such other party may be joined as a party respondent by the petitioner or on motion of the respondent, or by petition to intervene. Such other party may file a separate answer or adopt the pleadings or return of the body or officer. Thereafter a final order in favor of the petitioner shall be directed against said body or officer and against said other party, each of whom shall have a right of appeal under section one D of chapter two hundred and thirteen. [As amended through St. 1963, c. 661, § 1.]

MASSACHUSETTS GENERAL LAWS, CHAPTER 213.

SECTION 1D. A person aggrieved by a final judgment or any order decisive of the issues rendered by a single justice

of the supreme judicial court or by the superior court upon a petition for a writ of certiorari or a writ of mandamus may appeal therefrom to the full court of the supreme judicial court. Upon such appeal all questions, whether of fact, of law or of discretion, which were open at the hearing before the single justice or before the superior court, as the case may be, shall be open to the same extent as before such justice or court. The appeal shall be subject to the provisions of sections nineteen and twenty-two to twenty-eight, inclusive, of chapter two hundred and fourteen relative to appeals in equity suits, so far as applicable. [As added by St. 1943, c. 374, § 4.]

Appendix C.

JOHN F. ZAMPARELLI
DAVID R. WHITE
ANTHONY J. DIPERNA

DAVID BERMAN
ROBERT P. DOHERTY
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ZAMPARELLI AND WHITE
ATTORNEYS AT LAW
64 SALEM STREET
MEDFORD, MASSACHUSETTS 02155
AREA CODE 617-395-6630

January 22, 1968

Re: Johnson Products, Inc. v. City Council of Medford
No. 13,828

Honorable Raymond S. Wilkins
Chief Justice of the Supreme Judicial Court
1300 Court House
Boston, Massachusetts

My dear Mr. Chief Justice:

The petitioner in the above-entitled case respectfully seeks rehearing by the court of the rescript affirming the order of the Superior Court sustaining the respondents'

demurrer to the petition for writ of certiorari. This request is made partly on the ground that the court decided adversely to the petitioner certain federal constitutional issues that the petitioner could not have properly anticipated. *Saunders* v *Shaw*, 244 U.S. 317, 320.

The petitioner does not now directly attack so much of the opinion as orders dismissal of its bill for declaratory relief. It points out, however, that there was no opportunity for the petitioner to anticipate that dismissal. As the opinion of the court correctly states (P. 5), the defendants to the bill claimed no appeal from the interlocutory decree overruling their demurrer. They likewise claimed no appeal from the final decree. (Cf. *Caples* v *Secretary of the Commonwealth*, 350 Mass. 638, 639, wherein the defendant specifically appealed from the final decree in his favor in order to preserve his question as to the availability of declaratory relief.) The defendants neither in their brief nor orally argued that this case was inappropriate for resolution by declaratory decree. Whatever "misgivings" the judge below may have had "as to the efficacy and propriety of the bill" (P. 5 of the Court's opinions) were directed at the question of whether there was a controversy between the parties within the purview of G.L. c. 231A, § 1 and not that of whether declaratory relief was appropriate under c. 231A, § 3 (RD. 10; Tr. 5). The cases of *Carlton* [*Hotel, Inc.*] v *Abrams*, 322 Mass. 201, and *James Construction Co., Inc.* v *Commissioner of Public Health*, 336 Mass. 143, are cited on page 8 of the Court's opinion for the proposition that "appeal from the final decree opens the question whether a declaratory decree ought to be entered.". But both of these cases arose on appeals after decrees *sustaining* demurrers, and in both these cases the question of the appropriateness of declaratory [*sic*] was anticipated and argued by the parties. See in *Carlton* [*Hotel, Inc.*] v *Abrams*, pages 4-7 of the petitioner's brief and pages 4-7 of the de-

fendant's brief; in the *James* case, see pages 3-7 of the petitioner's brief and pages 8-14 of the brief for the defendants.

The present petitioner submits that there is no reported case in which this court has ever considered *sua sponte* the appropriateness of equitable or declaratory relief after an unappealed interlocutory decree overruling a demurrer and a final decree unappealed by the defendant. Since the petitioner in this case could have had no inkling that the bill would be ordered dismissed, it had no reason to argue in its brief points of federal constitutional law (see, however, Bf. 6, line 8) applicable to the petition for certiorari. This is because all such points were argued in respect to the bill, and a rescript affirming the Superior Court would have led to a judgment reviewable by the Supreme Court of the United States. 28 U.S.C. § 1257. Now in view of the court's unforeseen and unforeseeable ruling with regard to the bill for declaratory relief, the petitioner points out that [*sic*] the following constitutional infirmities in the opinion insofar as it relates to the petition for certiorari.

It is unconstitutional under the due process clause of the Fourteenth Amendment to deprive a person of the right to engage in a lawful business on the basis of "matters of common knowledge in the community, such as hours of heavy traffic" (see page 4 of the opinion) without giving him an opportunity to meet and rebut evidence on such matters. *Interstate Commerce Commn.* v *Louisville & Nashville Railroad Co.*, 227 U.S. 88, 93. *Willner* v *Committee on Character and Fitness*, 373 U.S. 96, 105-106. As a legal encyclopedia of recent vintage succinctly states, "And it is established that there is no hearing in the constitutional sense where the party does not know what evidence is offered *or considered* and is not given an opportunity to test, explain or repute [*sic*]" 16 Am. Jur. 2d § 579, p. 985 (Emphasis supplied). The present petition alleges

that "no sworn evidence was *presented*" which would have justified denial of the petition and that the council gave no reasons for its denial (R. 2). Accordingly, if, as the court suggests, the council may have acted upon matters of common knowledge in the community, the petition shows that it never imparted such "knowledge" to the petitioner. Thus, the action of the council in denying the petition was unconstitutional as asserted in paragraph 9 of the petition (R. 3). See Cooper, State Administrative Law, v. 1, p. 363-367.

It is also unconstitutional under the due process clause of the Fourteenth Amendment to deny a license to engage in a lawful business without giving any reasons for the denial. (Cf. page 5 of the Court's opinion.) *Goldsmith* v. *Board of Tax Appeals,* 270 U.S. 117, 123. *Florida* v *United States,* 282 U.S. 194, 215. As the court said in the *Willner* case, *supra,* 105, "Petitioner was clearly entitled to notice of . . . the grounds for his rejection."

The cases cited by the court for the contrary conclusion, *Cefalo* v *Board of Appeals of Boston,* 332 Mass. 178, and *Adams* v *Adams,* 331 Mass. 354, did not involve licensure but merely zoning variances. If it is constitutional for an administrative board to fail to give reasons for denying a variance, the constitutionality is predicated upon the legislative nature of the decision (see *Pacific States Box & Basket Co.* v *White,* 296 U.S. 176, 186) and has no application to decisions of an adjudicatory nature.

Finally, the petition clearly states that the denial of the license was "arbitrary, capricious, unlawful, unsupported by substantial evidence and violative of the petitioner's rights under the Fourteenth Amendment to the Constitution of the United States" (R. 3). The opinion of the court does not deal with this allegation and, by sustaining the demurrer, implicitly overrules the petitioner's constitutional objections. The petitioner submits that this para-

graph, especially taken in conjunction with the remainder of the petition, amply supports the petitioner's argument that denial of the license in this case violated his federal constitutional rights. *Weaver* v *Palmer Bros. Co.*, 270 U.S. 402, 412. *Williams* v *Standard Oil Co.*, 278 U.S. 235, 240. *New State Ice Co.* v *Liebmann*, 285 U.S. 262, 278. See, especially, the allegations of paragraph 7 (R. 2-3) that "several of the councillors stated publicly . . . that their motive in voting to deny the petition was to protect existing gasoline stations from increased competition." *Dobbins* v *Los Angeles*, 195 U.S. 223, 239.

In seeking this re-hearing the petitioner respectfully points out to the court that the constitutionality of G.L. c. 148 § 13 is now put in issue and that, if this statute, as interpreted in this case, is struck down, there will be no effective procedure for licensing gasoline stations in this Commonwealth.

For reasons that have been stated in this letter the court is asked to reconsider whether errors of constitutional law are shown on the face of the petition and whether G.L. c. 148 § 13 should not be declared unconstitutional or, alternatively, interpreted to require local licensing authorities to observe minimal and elementary requirements of due process before denying an applicant a permit to engage in a business regulated by that statute.

Respectfully,
ZAMPARELLI AND WHITE
DAVID BERMAN
David Berman
Attorney for the Petitioner

Copy:
Mark E. Gallagher, Jr., Esquire
City Solicitor—City of Medford
City Hall
Medford, Massachusetts

SUPREME JUDICIAL COURT
Boston 8, Massachusetts

Raymond S. Wilkins
Chief Justice

January 24, 1968

David Berman, Esquire
64 Salem Street
Medford, Massachusetts 02155

Dear Sir:

Your request for rehearing in case No. 13,828, *Johnson Products, Inc.* v. *City Council of Medford,* has been received and will be considered by the full court.

Yours truly,
R. S. WILKINS
Chief Justice

cc: Mark E. Gallagher, Jr., Esquire

SUPREME JUDICIAL COURT
Boston 8, Massachusetts

Raymond S. Wilkins
Chief Justice

January 30, 1968

David Berman, Esquire
64 Salem Street
Medford, Massachusetts 02155

Dear Sir:

Your request for rehearing in case No. 13,828, *Johnson Products, Inc.* v. *City Council of Medford,* has been considered by the full court and is denied.

Yours truly,
R. S. WILKINS
Chief Justice

cc: Mark E. Gallagher, Jr., Esquire, City Solicitor—City of Medford

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In the Supreme Court of the United States.

OCTOBER TERM, 1967.

No. 1398.

JOHNSON PRODUCTS, INC.,
Appellant,

v.

CITY COUNCIL OF MEDFORD ET AL.,
Appellees.

MOTION TO DISMISS OR AFFIRM.

ARTHUR V. GETCHELL,
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In the Supreme Court of the United States.

OCTOBER TERM, 1967.

No. 1398.

JOHNSON PRODUCTS, INC.,
Appellant,
v.
CITY COUNCIL OF MEDFORD ET AL.,
Appellees.

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

MOTION TO DISMISS OR AFFIRM.

Now come the appellees and move to dismiss this appeal or to affirm the judgment of the Supreme Judicial Court of Massachusetts on the grounds that the questions presented by the appeal are so insubstantial as to require no further argument, and that the decision of the state court here appealed rests on an adequate, non-federal basis.

Question Claimed Presented by the Appeal.

Is section 13 of chapter 148 of the General Laws of Massachusetts constitutional within the purview of the due-process clause of the Fourteenth Amendment when, as interpreted by the highest court of Massachusetts, it permits

municipal licensing authorities to deny a license to operate a gasoline station on the basis of facts not presented at the hearing on the issuance of the license and without giving reason for their decision (Appellant's Jurisdictional Statement, p. 2)?

Statement.

A. This appeal may lie as of right if the state statute is *per se* unconstitutional or if its logical application in the particular situation resulted in a deprivation of constitutional rights.

28 U.S.C. § 1257(2).
Dahnke-Walker Milling Co. v. *Bondurant*, 257 U.S. 282.

It will only qualify for attention, if the basis is in the application, if the appellant points out to the state court the said lack of constitutionality, specifically and clearly.

Hanson v. *Denckla*, 357 U.S. 235, 244.

The burden of establishing that the lack of constitutionality was plainly and clearly demonstrated to the court was upon the appellant.

If the appeal fails as of right, its conversion to a petition for certiorari might follow, and the appeals to the exercise of discretion would be considered.

Lawrence v. *State Tax Commission of Mississippi*, 286 U.S. 276.
28 U.S.C. § 1257(3).

The appellees submit that the decision was not made on "facts" not presented, as the question posed assumes.

The appellees submit that the application of the statute was never argued and that there is nothing to evoke the use of discretion in favor of the appellant.

The statement of the petitioner relative to Massachusetts practice on demurrers is correct to a point, but for more substantial accuracy it must be said that not all facts pleaded, but only facts well pleaded, are deemed to be true.

Johnson Products, Inc. v. *Medford,* Jurisd. St., App. A, p. 19.

Lloyd v. *Howes,* 350 Mass. 19, 21.

The distinction is important in this case since the Massachusetts court has stated that the original petition was objectionable on the grounds: "(1) [it] recites extraneous matters to which a response is impossible; (2) [it] states generalities of fact and conclusions of law to support allegations of arbitrariness and unlawful conduct."

Jurisd. St., App. A, pp. 18, 19.

The portions of the appellant's statement, contained in a footnote, that deal with what occurred in the dismissal of its petition for a declaratory judgment (Jurisd. St. p. 3) are superfluous and confusing in that the said dismissal was not appealed to this court.

Chapter 148 of the General Laws of Massachusetts is a comprehensive legislative effort to completely cover the subject of "Fire Prevention" in the Commonwealth. The section involved here, section 13 (Jurisd. St., App. B, p. 23), is only one of fifty-six or fifty-seven sections.

The City of Medford has a zoning ordinance and a building code. The former (c. 29, § 5.3, item 26) requires a special permit for gasoline filling stations to be issued by the Council in the zoning district occupied by the locus in

question, as well as a permit under G.L. c. 148, § 13, to operate the said station. In other zoning districts created by the ordinance no special permit is required.

Argument.

1. The appellant has failed to bring himself within 28 U.S.C. § 1257(2).

By its own admission (Jurisd. St. p. 4, portion of footnote 2) the appellant reveals that the constitutional effect on its petition for certiorari was not argued. The argument was made only in a different case, the petition for a declaratory judgment.

The issue of unconstitutionality had to be made plain and clear.

Hanson v. *Denckla*, 357 U.S. 235.

Lest concern about a miscarriage of justice might arise, it should not be overlooked that the appellant had a full trial on the merits in that same "other" case.

2. The "application" filed by the appellant with the City was ambiguous.

This document (R. 4) could pass for a request for a building permit, a request for a special permit under the zoning law (G.L. c. 40A, § 4, as amended by Acts 1966, c. 199), or a request for a permit under G.L. c. 148, § 13. It was the forerunner of a confused petition for a writ of certiorari. Neither this court nor the court below should be obliged to sort out what the "application" meant.

3. The petition for certiorari did not contain sufficient well-pleaded allegations to merit a return, as pointed out

in the decision of the Supreme Judicial Court and for the reasons stated in its decision.

It has been stated that there is every presumption in favor of the honesty and sufficiency of the motives actuating public officers in actions ostensibly taken for the general welfare. If error of law is claimed, it must be made to appear upon the face of the return, and, if the return is inadequate, the petitioner must take steps to have it extended to show the error which he claims.

Kidder v. *City Council of Brockton*, 329 Mass. 288, 289.

In the petition requesting certiorari, assuming it to be well pleaded, it appears that matters germane to the decision of such an issue were discussed at a public hearing: public health, public safety, public welfare, fire hazards, building hazards, amount of storage and the location of the business. All of these matters were before the City Council and it had a chance to make a decision on them, and did. There was no evidence at all that the petitioner was denied any opportunity to present its problems or views to the City Council. It was represented by counsel. There was no reason, therefore, to assume that any return would show error, and it does not appear logical to require the filing of a return to establish evidence that is not properly alleged to exist. There was therefore nothing well-pleaded as to the "face of the record" to show apparent error.

4. In Massachusetts a successful applicant under G.L. c. 148, § 13, receives "a covenant running with the land" as well as a gasoline permit for the location upon use of the privilege. The practice is uniformly applied throughout the state.

Saxe v. *Street Commissioners of Boston*, 307 Mass. 495.

The local authority is given wide discretion beyond the mere question of fire risk, and may consider matters affecting the public interest.

Scudder v. *Selectmen of Sandwich,* 309 Mass. 373.

Kidder v. *City Council of Brockton,* 329 Mass. 288, 289.

See *Marchesi* v. *Selectmen of Winchester,* 312 Mass. 28, 30, 31.

Such a license is not subject to the "ordinary business rule" relative to issuance.

See 9 McQuillin, Mun. Corp. (3d ed.), § 26.66.

The operation of gasoline filling stations is generally the subject of special regulation at the local level everywhere.

7 McQuillin, Mun. Corp. (3d ed.), § 24.345.

5. Where discretion is invested in local officials, no reasons need be given to explain a decision denying a special zoning permit or a land-use permit.

Such a decision has the aspect of being the exercise of legislative power and also one of the exercise of quasi-judicial power. In any event, no statement of reasons, unless specifically provided for, is required under either concept in the premises. The decisions are obviously not ministerial or merely administrative, since it is contemplated that some applications will be denied as a matter of discretion. The Massachusetts statute recognizes the need for local views on these matters and has delegated the power accordingly to the local authorities to decide.

Conclusion.

This court is being asked to review the action of the Supreme Judicial Court of Massachusetts in its ruling on a demurrer to a petition for a writ of certiorari. If the demurrer should have been overruled, then the issuance of the writ is still discretionary. The petitioner has had his day in court on the merits of his case in any event. The matter has no substance for the consideration of this court.

The matter received careful review at the state level. The appellant, having established no constitutional rights, was deprived of nothing.

For the reasons stated, it is respectfully submitted that this motion should be granted and that the appeal should be dismissed, or, in the alternative, that the judgment of the Supreme Judicial Court should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

JOHNSON PRODUCTS, INC. *v.* CITY COUNCIL OF MEDFORD ET AL.

APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

No. 1398. Decided June 10, 1968.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.